



DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning a Whoop Strap Device

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of a device referred to as a Whoop Strap. Based upon the facts presented, CBP has concluded in the final determination that the incomplete Whoop Strap and the programming in the United States would not render the Whoop Strap device to be a product of a foreign country or instrumentality designated for purposes of U.S. Government procurement.

DATES: The final determination was issued on November 10, 2020. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within [insert 30 days from date of publication in the *Federal Register*].

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325-0046.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on November 10, 2020, U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of a Whoop Strap device for purposes of Title III of the Trade Agreements Act of 1979. This final determination, HQ H309761, was issued at the request of Whoop Inc., under procedures set forth at 19 CFR Part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511-18). In the final determination, CBP has concluded that, based upon the facts presented, the incomplete imported Whoop Strap and the programming in the United

States would not render the finished Whoop Strap to be a product of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b) for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the *Federal Register* within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the *Federal Register*.

Dated: November 24, 2020.

Alice A. Kipel,
Executive Director,
Regulations and Rulings,
Office of Trade.

HQ H309761

November 10, 2020

OT:RR:CTF:VS H309761 CMR

CATEGORY: Origin

Steven B. Zisser, Esq.
Zisser Group
9355 Airway Road
Suite 1
San Diego, CA 92154

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511); subpart B, Part 177, CBP Regulations; Country of Origin of a Whoop Strap Device

Dear Mr. Zisser:

This is in response to your request of February 27, 2020, on behalf of your client, Whoop, Inc., for a final determination concerning the country of origin of a device referred to as a “Whoop Strap.” This request is being sought because your client wants to confirm eligibility of the device for U.S. government procurement purposes under Title III of the Trade Agreements Act of 1979 (TAA), as amended (19 U.S.C. § 2511 *et seq.*). As an importer of the merchandise imported from China that is processed in the United States to become a finished “Whoop Strap,” your client may request a final determination pursuant to 19 CFR § 177.23(a).

FACTS:

You describe the “Whoop Strap” as:

. . . a fitness performance tracker that combines a wrist-worn device with a cloud-based analytics system. It incorporates a sensor that generates data that is to be processed through the analytics system to provide information relating to the fitness of the individual wearing the wrist-worn device.

You indicate “[t]he products consists of hardware, a sensor, printed circuit board assembly (PCBA) incorporating a radio module, and battery which [are] encased in a polycarbonate housing with clasp and attached to a fabric wristband.” A memory device on the PCBA is adapted to receive and store proprietary software which is developed by Whoop. The software records and communicates the fitness data and generates the analytics.

The manufacturing of the hardware of the Whoop Strap occurs in China where the sensor, PCBA, battery and housing are assembled. You also indicate that there is a cover that is placed over the case/kit. You state:

All hardware components are “designed” in the USA and produced and assembled in China. In the USA, the hardware is attached to the fabric waistband with a clasp.

After assembly in China and before exportation to the United States, the Whoop Strap is tested to confirm the assembly was properly done. You refer to the test as a “power on” test which requires minimal software and equipment. You indicate that the testing software is removed prior to shipment to the United States and “[a] ‘simple’ firmware updater is loaded on the device in China [that] will allow further software to be loaded in the USA.” At the time of shipment from China, you indicate that the Whoop Strap does not function.

After importation into the United States, “Whoop programs the proprietary communications software, file software, and battery pack communications firmware.” You state that “[t]his process is achieved by writing, testing and implementing the necessary code to make the product function as intended.” The software and firmware codes are developed and written in the United States by Whoop employees. Once programmed in the United States, the device functions as intended, *i.e.*, being able to sense and communicate health data to the user. The programming of the device in the United States greatly increases its value.

ISSUE:

Whether the Whoop Strap, which is assembled in China and programmed with software and firmware in the United States, is eligible under the Title III of the TAA, as amended (19 U.S.C. §§ 2511-2518).

LAW AND ANALYSIS:

U.S. Customs and Border Protection (CBP) issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain “Buy American” restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 C.F.R. § 177.21 *et seq.*, which implements Title III, Trade Agreements Act of 1979, as amended (19 U.S.C. §§ 2511-2518).

The rule of origin set forth in 19 U.S.C. § 2518(4)(B) states:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See *also* 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. See 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government’s purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. See 48 C.F.R. § 25.403(c)(1). The Federal Acquisition Regulations define “U.S.-made end product” as:

. . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

The regulations define a “designated country end product” as:

WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

A “WTO GPA country end product” is defined as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

See 48 C.F.R. § 25.003.

China is not a WTO GPA country.

The article imported into the United States is the Whoop Strap assembled hardware consisting of a sensor, PCBA, battery and housing with a cover placed over the case/kit. The article, in its condition as imported, is incomplete and non-functional as it lacks the software and firmware necessary for it to function. The incomplete Whoop Strap, at the time of importation, is a product of China. CBP is of the view that programming would not result in a substantial transformation. This is consistent with CBP’s prior determination in H284523 dated August 22, 2017, where CBP held that an imported tablet did not undergo a substantial transformation by programming. See *also* H284617 dated February 21, 2018.

CBP’s authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. § 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, **an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.**

Emphasis added.

Therefore, the Whoop Strap would not be considered to be the product of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b). As to whether the Whoop Strap processed in the United States may be considered a “U.S.-

made end product” is under the jurisdiction of the procuring agency. See *Acetris Health, LLC. v. United States*, No. 2018-2399 (Fed. Cir. February 10, 2020).

HOLDING:

The incomplete Whoop Strap and the programming in the United States would not render it to be a product of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b). You may wish to check the classification of this product to determine if it may be subject to any Section 301 duties upon importation.

Notice of this final determination will be given in the *Federal Register*, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the *Federal Register* Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Alice A. Kipel, Executive Director,
Regulations and Rulings,
Office of Trade.